Nos. 329 - 330

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1950

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL, CHARLES BREHM, THOMAS MURACH, RAYMOND KNUTSON, JACK WERY, JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER, PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM BUCHE, GEORGE SLOAN, EDWIN BECKER AND OTHMAR MISCHO,

v. Petitioners,

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

v. Petitioners,

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation, Respondents.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF OF RESPONDENTS
Except The Milwaukee Electric Railway & Transport Company

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OPINIONS BELOW

As to #329

The opinion of the Circuit Court for Milwaukee County (R. 101-118) is unreported. The opinion of the Wisconsin Supreme Court (R. 163-171) is reported in 257 Wis. 43, 42 N. W. 2d 471.

As to #330

The opinion of the Circuit Court of Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. 2d 477.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

QUESTIONS PRESENTED

As to #329

Whether a state may, by statute and injunction, prohibit strikes by employees of "public utility" employers when such strikes will result in an "interruption of an essential service."

As to #330

Whether a State may by statute require employees of a "public utility" employer to submit disputes regarding contract terms to arbitration when collective bargaining reaches a stalemate and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike.

STATE STATUTES INVOLVED

The pertinent state statutes, sections 111.50 to 111.65, Subchapter III of Chapter 111 of the Wisconsin Statutes for 1949 are printed in the appendix of petitioner's brief in case No. 330, pages 39-47, hereinafter referred to as "the Wisconsin Statute."

The salient features of the Wisconsin Statute are as follows:

The statute contains a legislative declaration that the injury to the public arising from interruption of public utility service justifies the action taken to protect the general welfare (111.50). It imposes on employers and employees the duty of endeavoring to reach agreement through collective bargaining (sec. 111.52). It authorizes the Wisconsin Employment Relations Board to appoint a conciliator when the bargaining process reaches a stalemate (sec. 111.54) and where an interruption of essential service is likely, authorizes it to appoint arbitrators (sec. 111.55). The arbitrators' award is final (subject to judicial review) and endures for one year (secs. 111.59 and 111.60). Strikes are forbidden and violations are made a misdemeanor (sec. 111.62). The Wisconsin Employment Relations Board is made responsible for enforcement and is authorized to commence an action in circuit court to compel compliance (sec. 111.63).

FEDERAL STATUTES INVOLVED

The federal statutes involved are the Labor Management Relations Act of 1947, 61 Stats. 152-156, 29 U. S. C. Supp. §§171 to 182.

STATEMENT

As to case #329

All of the public passenger-transportation service by the Milwaukee Electric Railway and Transport Company is furnished within Milwaukee County, Wisconsin. (R. 152).

The services of the 2700 employees are essential to carrying out the operation of the Transport Company (R. 153). A strike by the employees would cause interruption of the essential service of the Transport Company and the defendants threaten so to do (R. 153). The conduct of the defendants would work irrevocable injury to the plaintiff board and to the citizens of the State of Wisconsin (R. 154).

The Wisconsin Blue Book, published biennially by the State of Wisconsin shows the 1940 population of the City of Milwaukee to be 587,472; and of the County of Milwaukee to be 766,885.

As to case #330

The Milwaukee Electric Railway and Transport Company, hereinafter referred to as "the company" or "the Transport Company," is a public utility which, since its organization in 1938, has owned and operated all except a few of the streetcar, trolley and motor bus public transportation facilities in the City of Milwaukee (R. 163-164).

This dispute arose over the failure of the parties to agree on a new contract to succeed the previous contract which had been cancelled by the Company pursuant to proper notice, effective midnight December 31, 1948. On January 5, 1949, a work stoppage occurred. The Conciliator first directed his efforts toward securing a resumption

of service. Service was resumed in full the following morning (R. 141).

The Wisconsin Employment Relations Board was of the opinion when it provided for arbitration that the collective bargaining process between the company and the union, notwithstanding good faith efforts on the part of both sides to the dispute, had reached an impasse and stalemate and that such dispute if not settled would cause or would be likely to cause the interruption of an essential service (R. 122).

SUMMARY OF ARGUMENT

The Wisconsin Statute is constitutional because

I. It operates in a limited field in which the National Act has not displaced state regulation.

   a. The National Act recognizes the need for procedure for limiting strikes which create a public emergency. By its silence as to public emergencies which are less than national, it has left this field to the State.

   b. The National Act does not prevent the State's protecting its citizens from interruption of public utility services. The State may still protect its citizens from interruption which endangers public health, safety and welfare.

   c. In this special field, the National Act does not prevent the State from substituting compulsory arbitration for the alternative of a strike when collective bargaining breaks down.

d. The O'Brien decision is not decisive of this case.

e. Nothing in the Wisconsin Statute condones unfair labor practices which are unlawful under the National Act. The Wisconsin Statute does not prevent the National Labor Relations Board from performing its functions.

II. The Wisconsin Statute does not violate the due process clause of the 14th Amendment.

III. The Wisconsin Statute does not impose involuntary servitude.

ARGUMENT

I.

THE WISCONSIN STATUTE OPERATES IN A LIMITED FIELD IN WHICH THE NATIONAL ACT HAS NOT DISPLACED STATE REGULATION.

(a) The National Act recognizes the need for procedure for limiting strikes which create a public emergency. By its silence as to public emergencies which are less than national, it has left this field to the State.

Congress recognized that the breakdown of collective bargaining may occur notwithstanding the rights guaranteed and duties imposed by the National Act. It recognized that such a breakdown may affect the public interest so greatly that there must be a special procedure for preventing a strike. Thus Congress recognized a separate segment of the field of labor relations, the segment where grave

public danger results when the collective bargaining process breaks down. This recognition is shown by the enactment of Secs. 206-210 of the National Act which provides that when, in the opinion of the president, a strike or lockout affecting an entire industry or substantial part thereof imperils the national health or safety, he may take certain steps leading to an injunction against a strike or lockout. No provisions were made, however, for the same type of situation which is less than national in scope. It therefore follows that when a strike or lockout imperils health or safety in a community, Congress has not prevented the state from protecting the community by imposing limitations on a strike or by prohibiting it altogether.

In adopting the National Act, Congress was concerned with "industrial strife which interferes with the normal flow of commerce," "full production of articles and commodities for commerce," the "full flow of commerce" and "labor disputes affecting commerce." Sec. 1 of Labor Management Relations Act, 1947 and Sec. 1, National Labor Relations Act as amended.

Congress dealt with the problem of protecting the free flow of commerce from the effects of industrial strife. Nowhere in the Act is it suggested that it intended to deal with, or foreclose a state from dealing with, the problem of protecting a community from the interruption of public utility service which occurs when a labor dispute erupts into a strike.

The two problems are distinct. In the general field with which Congress dealt, an interruption of the business of an employer immediately and directly affects only the employer, the employees and their families. Ultimately the effect will be felt by those who rely on the employer

as a customer or supplier and those who rely on the employees as customers, but the rate at which this happens will vary. It is true that the community where the dispute occurs will also be affected by a continued strike, but it is rare that a strike of one or a few days' duration will have a substantial effect upon the community.

In the specific public utility field, however, an interruption of service immediately, directly and substantially affects almost every activity of the community where it occurs. It immediately injures many who are not parties to the dispute. In the case of the utility here concerned, school children, shoppers, business, professional and factory workers and all who rely on public transportation service are affected the day the interruption occurs. Interruptions in gas, electric, water or telephone service have effects of similar scope.

Congress has not said expressly that the state has no power to evaluate and deal with the latter problem in a situation otherwise subject to the National Act. Is such a prohibition to be implied? It does not appear that Wisconsin's solution to the specific problem will disrupt or conflict with the federal scheme. It is our contention that the legislature had powers to prohibit strikes which would cause interruption of essential public utility service and compel arbitration where the collective bargaining process has reached a stalemate.

In the absence of pre-emption by Congress the States may regulate the labor relations of industries engaged in operations affecting commerce. See *Algoma Plywood Co. v. Wis. Board*, 336 U. S. 301, 69 S. Ct. 584; *Auto Workers v. Wis. Board*, 336 U. S. 245, 69 S. Ct. 516; *LaCrosse Telephone Corp. v. Wis. Board*, 336 U. S. 18, 69 S. Ct. 379; *Allen-*

Bradley Local 1111, United Electrical Radio and Machine Workers of America et al. v. Wisconsin E. Rel. Bd., 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154.

(b) The National Act does not prevent the State's protecting its citizens from interruption of public utility services. The State may still protect its citizens from interruption which endangers public health, safety and welfare.

The special status of public utility services has long been recognized. The State grants certain privileges to those who engage in rendering services recognized as public utilities. The State has the power to insist that those who enter the public utility field continue to render the service. One of the characteristics of the State's permission to render public utility service is that the State excludes others from rendering the same service. Thus, those who are engaged in rendering public utility services would, if allowed to interrupt service at their will, have an unusual opportunity to do damage to the public. The public does not have the protection which in other fields arises from the fact that if one supplier of a commodity or a service stops business, those same commodities or services are available to some degree at least from competitors.

Various Wisconsin Statutes impose requirements on public utilities. Chapter 193, Wisconsin Statutes, contains regulations of street railways and, among other things, requires that lines shall be extended and service furnished as ordered by a commission. Sec. 193.10. Chapter 196 contains regulations of telephone, heat, light, water, gas and power utilities and requires that reasonably adequate service and facilities be furnished. Sec. 196.03.

It was said in *Wisconsin E. R. Board v. Amalgamated Asso.*, (1949) 257 Wis. 43, 47-48:

"* * * The operations of public utilities have long been subject to scrutiny by regulatory bodies set up by the state to protect the rights of the public. Among the details of their operations subject to regulation are the right to engage in or to discontinue operations, the type and amount of service to be rendered, expansion programs, the type and amount of securities to be issued, rates to be charged, accounting systems and the amount of depreciation permitted to be charged off. In ordinary commercial enterprises these matters are left to management. On the other hand, utilities are granted certain privileges by law, such as the elimination of most competition and the right of eminent domain. Persons who invest their savings in the securities of a public utility know their capital is subjected to the regulation and control of the state. They must weigh the advantages against the disadvantages in determining in what type of enterprise they will invest. Management and investors alone cannot operate a public utility. There must be natural persons employed to give it life. All are part of one organization which is subject to control by the state. So persons seeking employment must weigh the advantages and disadvantages of employment by public utilities. There are many advantages to this type of employment: There is generally a continuity of employment in the public-utility field; the state has not been adamant in refusing higher rates when necessary to improve service and working conditions or to bring wages to a standard comparable to wages in other lines of endeavor; the public, too, has been generous in its acceptance of higher rates when they are necessary to pay utility employees suitable wages; utilities may not cease operations nor lock out employees."

Nowhere has it been held that the National Act creates an inalienable right to strike which may not be prohibited by state law. *Auto Workers v. Wisconsin Board*, 336 U. S. 245, 69 S. Ct. 516, *Dorchy v. Kansas*, 272 U. S. 306, 311, 47 S. Ct. 86, 87, 71 L. ed. 248.

The National Act itself in sec. 8(b)(4)(A)(B)(C) and (D) prohibits four different kinds of strikes.

In *Algoma Plywood & Veneer Co. v. W. E. R. B.*, 336 U. S. 301, 69 S. Ct. 584 decided on March 7, 1949, the supreme court held that the States were *not* prevented from characterizing certain types of employer conduct as unfair Labor Practices by Section 10(a) of the National Labor Relations Act which states:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be *exclusive*, and shall not be affected by *any* other means of adjustment or prevention that has been or may be established by agreement, code, *law*, or otherwise." [Emphasis supplied.]

This decision was reached in spite of the union's contention that Section 10(a) made Section 8 the exclusive standard as to what constituted unfair labor practices and that thereby the states were precluded entirely from characterizing other types of employer conduct as unfair labor practices. See also *Phelps-Dodge v. N. L. R. B.*, (1941) 313 U. S. 177, 61 S. Ct. 845, 85 L. ed. 1271.

The danger and inconvenience caused by interruption of services of a public utility operating wholly within one state is primarily a local and intrastate problem. Therefore in the absence of federal legislation clearly displacing state authority the state should be free to deal with the

problem even though the operations of the utility may have some effect on interstate commerce. *Maurer v. Hamilton*, 309 U. S. 598, S. Ct. , 84 L. ed. 969.

Our position is based on the rule that in the absence of legislation by Congress inconsistent therewith, the states may regulate local matters even though interstate commerce may be involved or affected. There are many cases supporting this rule, frequently denominated the "Cooley formula," some of them being as follows:

Cooley v. Wardens, (1851) 12 How. (53 U. S.) 299, 13 L. ed. 996;

Port Richmond Ferry Co. v. Board, (1913) 234 U. S. 317, 34 S. Ct. 821, 58 L. ed. 1330;

Pennsylvania Gas Co. v. Public Service Commission, (1920) 252 U. S. 23, 40 S. Ct. 279, 64 L. ed. 434;

Kansas Natural Gas Company v. Kansas, (1924) 265 U. S. 298, 44 S. Ct. 544, 68 L. ed. 1027;

Kelly v. Washington, (1937) 302 U. S. 1, 58 S. Ct. 87, 82 L. ed. 3;

Parker v. Brown, (1942) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315;

Bob-Lo Excursion Co. v. Michigan, (1948) 333 U. S. 28, 68 S. Ct. 358, 92 L. ed. 455, 463-464.

In *Cooley v. Wardens*, (1851) 12 How. (53 U. S.) 299, at pages 315-316, the court considered the effect of the commerce clause on the power of the Pennsylvania legislature to regulate boat pilots. The court said:

> "That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed

by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution."

The argument contrary to our proposition is based on the *O'Brien* case, which should be distinguished, see (d) infra.

Our contention is that the determination must rest on an analysis of each case; that the proper test is whether the state requirements relate to essentially "local" matters and the regulation may, as a practical matter, be carried on by the state without materially impairing the national interest.

In *Prudential Ins. Co. v. Benjamin*, (1945) 328 U. S. 406, 66 S. Ct. 1142, 90 L. ed. 1342, in the course of discussing permissible limits of state regulation or taxation over interstate commerce, it is said (p. 1355):

"* * * For, concurrently with the broadening of the scope for permissible application of federal authority, *the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than*

dogmatic logistic. These facts are of great importance for disposing of such controversies." [Emphasis ours]

In *United States v. South-Eastern Underwriters Assn.*, (1943) 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. 1440, Mr. Justice Black, in delivering the opinion of the court, observed (p. 1454):

"* * * And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities *the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated.* And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid." [Emphasis ours]

Page 1456:

"The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition."

In *Parker v. Brown*, (1943) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315, the opinion of the court written by Mr. Chief Justice Stone, states (pp. 332-333):

"* * * When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. (cases cited)

"Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' * * * not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. (cases cited) There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it."

(c) In this special field, the National Act does not prevent the State from substituting compulsory arbitration, for the alternative of a strike when collective bargaining breaks down.

In enacting the Wisconsin Statute, the legislature chose to place a higher value upon preventing the inconvenience and danger to the general public resulting from a cessation of essential public utility services than upon the complete freedom of employees to bargain over the terms of employment, with a strike, or the concerted withholding of personal services, as the employee's alternative to agreeing to terms they consider undesirable. Compulsory arbitration was deemed by the legislature to be a desirable means of settling disputes which reach a stalemate, and evidently the legislature felt that the substitution of this alternative in the place of labor's alternative of a strike was justified because of the high public value it placed upon continuity of essential services.

Attention is respectfully directed to the declaration of policy contained in sec. 111.50:

"It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases

where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare."

We submit that the Wisconsin legislature was within its powers in prohibiting strikes in public utilities and providing for compulsory arbitration in the event of a stalemate in the collective bargaining process.

At the outset it must be remembered that the Wisconsin Statute does *not* provide that as to public utilities compulsory arbitration shall completely *replace collective bargaining*. See secs. 111.50 and 111.52. Even after an arbitration order has been made it may be replaced at any time by an agreement of the parties. It is only when the collective bargaining process breaks down that the Wisconsin Employment Relations Board is authorized to step in and apply the conciliation and arbitration procedures. That compulsory arbitration is substituted for the alternative of a strike we do not deny, but we do deny that this procedure is in conflict with the National Act.

Applying the principle previously stated in this argument, that in cases of concurrent power over commerce State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted, one looks in vain at the National Act to see where Congress has manifested such a purpose insofar as state

laws providing for the settlement of labor disputes in public utilities by compulsory arbitration is concerned.

The National Act doesn't purport to go as far in the settlement of labor-management disputes in public utilities as the Wisconsin Statute does. It by no means follows that thereby the States are powerless to provide additional means of settling labor disputes to those found in the National Act. It is recognized in Section 203 (b) of the National Act itself that the Federal Act is not to wholly supplant State conciliation services. To adopt the argument of counsel for the union that the States may not go further than the National Act in the settlement of labor disputes in public utilities is to read limitations in the Act which do not appear there and which Congress manifested no intention to place there. It is to deny the power of the States to take action to avert industrial conflict that may have disastrous effect upon local communities but which does not create a national emergency so as to warrant the application of the injunction provisions of the National Act.

Though collective bargaining is encouraged by the National Act, it is not thereby made an inalienable right which it is beyond the power of the States to replace, under certain emergency conditions, with means for the settlement of labor disputes which a legislature deems more effective. It is the particular kind of emergency conditions, local in character, which are created by a strike in a public utility with which the Wisconsin Statute deals, and which we submit is an area left open under the National Act for the application of State law. Therein lies the reason why there is no conflict on the question of compulsory arbitration between the National Act and the Wisconsin Statute.

(d) The O'Brien decision is not decisive of this case.

Petitioners rely heavily on the decision in *International Union v. O'Brien*, 339 U. S. 454, 94 L. ed. (Adv. Op. 659), May 8, 1950. The court held invalid a Michigan statute prescribing certain conditions precedent to a lawful strike which are different from the conditions prescribed by the National Act. This court decided that there was thus a conflict.

The situation presented by the Wisconsin Statute is very different. It does not attempt to regulate strikes generally as does the National Act. It does not attempt to prescribe prerequisites for a strike as does the National Act. The Wisconsin Statute is limited to a type of industry where an interruption of service by its very nature directly, immediately, and substantially damages vital interests of the public in the particular community where the utility is located. Its prohibition against strikes and lockouts which will cause an interruption of essential service nor its provision of compulsory arbitration where collective bargaining has reached a stalemate is not an attempt to exercise concurrent jurisdiction with Congress over the general field of labor management relations. The Michigan statute imposed a pattern different from the National Act on a subject covered by the National Act. Both the Michigan statute and the National Act were directed at the broad public interests in maintaining peaceful industrial relations and in avoiding interruption in commerce and industry generally. The Wisconsin Statute prohibits conduct which injures the community in a direct, immediate and specific manner, by depriving it of essential public utility service.

Congress has not dealt with the problem except where the public emergency is national in scope.

The New Jersey court held that its public utilities disputes act, which forbids those strikes against public utilities which might imperil health and welfare, does not conflict with Labor-Management Relations Act, distinguishing *International Union, etc. v. O'Brien*, (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 659. Referring to the O'Brien case, the New Jersey Court said in *New Jersey Bell Tel. Co. v. Communication W. etc.* (1950), — N. J. —, 75 Atl. (2d), p. 727:

> "In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned. The Union had struck against a private industrial organization, engaged in interstate commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the Federal legislation and the court decided that because of the conflict the state statute was unconstitutional. The court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress, but the case being decided by the Court involved a statute regulating the right to strike against private industry. It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services, considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intrastate. It is significant that in the O'Brien case, supra, the court said 'Even if some legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which

prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested,' Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942) we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been preempted by Congress, and that the O'Brien case, supra, is inapplicable to the present situation."

(e) Nothing in the Wisconsin Statute condones unfair labor practices which are unlawful under the National Act. The Wisconsin Statute does not prevent the National Labor Relations Board from performing its functions.

As to public utility employes and their unions, the rights and duties guaranteed and imposed by the National Act may exist side by side with the restrictions imposed by the Wisconsin Statute. The National Board may fully exercise its functions without conflict with the Wisconsin Statute. The Wisconsin Statute affirmatively supports the requirement of collective bargaining as does the National Act. Nothing in the State Act can in any way affect or prejudice the right of employes to organize as set forth in Sec. 7 of the National Act. The Wisconsin Statute does not expressly nor by implication purport to make lawful the unfair labor practices described in Sec. 8. The National Board may proceed with its determination of bargaining units and representatives and may prevent unfair labor practices without any hindrance or embarrassment arising out of the existence of the Wisconsin Statute.

CONCLUSION TO PART I.

Because the Wisconsin Statute operates only in the field of strikes and lockouts insofar as they would cause an interruption in an essential service in a public utility and thereby protect the members of the community from an emergency directly affecting health, safety and welfare, the Wisconsin Statute does not supplant the National Act in a field where the National Act would take precedence if

there were conflict. Congress has not acted to provide rules for a situation where a strike or lockout creates a serious local public emergency. The State may still exercise its power over such situations.

II.

THE WISCONSIN STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

The grounds for the petitioners' attack under heading II of their brief are not clear. Petitioners assert that the Wisconsin Statute does "thus embrace previous restraints of fundamental human liberties which include but are not limited to the rights of free speech, public assemblage, freedom of contract and freedom to dispose of one's labor." Freedom for the individual to cease or to continue his work for a public utility employer is expressly protected by the Wisconsin Statute. Sec. 111.64. If he continues or commences such work after the passage of the Wisconsin Statute, he then accepts the express condition which attaches to such employment. He may voluntarily continue in such employment with the condition that he may not join with others in ceasing work with resulting interruption in an essential service. He is free as an individual, however, to give up his work as a public utility employe. It may also be that petitioners challenge the provisions of sec. 111.62 on the ground that they prohibit strikes in public utilities but do not prohibit employees from quitting their work singly, apparently on the theory that this is a discrimination against concerted action which denies privileges and

immunities to persons acting jointly which are accorded to persons acting individually. It would seem clear enough that a distinction between concerted action and individual action is based on a real and substantial difference germane to the purpose of the act; because the objective of the concerted action is obviously coercive and designed to interrupt essential service when individual action could not be. Such an argument is no more logical than it would be to argue that a city ordinance requiring a permit to be obtained before routing a parade through city streets is discriminatory because no permit is required for an individual to walk through the streets by himself.

In *France Packing Co. v. Dailey,* (C. C. A. 3rd, 1947) 166 F. 2d 751, the Circuit Court of Appeals pointed out that there is a wide distinction between a worker quitting his job for any reason and no reason, and cessation of production by workers who seek to win a point. The court said:

> "The contention that a limitation of the right to strike under the specified narrow conditions of Section 8 partakes of involuntary servitude is not substantiated by the cases. To the contrary, there is a wide distinction between a worker quitting his job, for any reason or no reason, on the one hand, and a cessation of production by workers who seek to win a point from management, on the other hand.
>
> "* * *
>
> "In brief, the restricted limitation of the right to strike, in this Act, refers to circumstances involving a continuing master and servant relationship. There is no involvement here with the distinct—and unquestioned—right of the worker to quit his job or the right of the employer to discharge him for cause. In this situation we fail to see any true constitutional question in this case." (pp. 753, 754)

Similarly in *State v. Traffic Tel. Workers Fed. of New Jersey*, (1948) 61 A. 2d 570, 575:

> "The Union next argues that whatever is lawful for one man to do, is lawful for several to do in concert; individual employees may quit their jobs at pleasure, therefore they may 'strike' in concert. The major premise is generally true in the absence of legislation to the contrary, but it is not true when the Legislature, acting within the wide range of its powers, prohibits such concerted action. A strike is a concerted cessation of work, intended to disrupt the business of the employer, and thereby induce him to act in a manner desired by the strikers. It has, and is intended to have, an entirely different effect from that produced by individuals acting independently, who resign their employment. The State does not have to ignore this difference. It can properly forbid such concert of action when the effect would be to disrupt essential services of a public utility, especially where it is found by the Governor that the cessation of operations will seriously injure the public interest. The Union suggests that there is an inherent or constitutional right to strike, a right beyond the reach of the State. I know of no such right when the strike will cause great injury to the public. In my opinion, the adoption of the Union's view in this respect might lead to national disaster."

If the appellants' contentions with respect to discrimination are based on the fact that the law applies only to public utilities and not to other industries, that is a distinction which has for many, many years been uniformly regarded as warranting a difference in treatment.

Munn v. Illinois, (1876) 94 U. S. 113, 24 L. ed. 77.

See, also, *Wilson v. New*, (1916) 243 U. S. 332, 352-354, 61 L. ed. 755, 37 S. Ct. 298, where it is said:

> "(b) *As to the employee.* Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the resulting right to fix in case of disagreement and dispute a standard of wages as we have seen necessarily obtained.
>
> "In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest and of the work in which they are engaged and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. This results from the considerations which we have previously pointed out and which we repeat, since conceding that from the point of view of the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference, that right in no way affects the law making power to protect the public right and to create a standard of wages resulting from a dispute as to wages and a failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative

power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right. * * *"

Even if it be conceded that Congress went to the borderline in the case of *Wilson v. New*, certainly the legislature is well within that borderline in the instant case, because there is no question that it is dealing with public utility regulation as Congress did in *Wilson v. New*. That is the distinction between *Wolff Packing Co. v. Court of Industrial Relations*, (1925) 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441, cited by appellants, and the case of *Wilson v. New*. In the former, the regulation was made applicable to competitive industry operating under the system of free enterprise, whereas in the case of *Wilson v. New* the court dealt with a public utility. The type of legislation involved in the instant case is fully as much of "the temporary emergency type of legislation" as that dealt with in the case of *Wilson v. New*.

The fact that the wage rate in *Wilson v. New* was fixed in a statute would make it no less a deprivation of constitutional rights than if it were fixed by administrative tribunal. If the legislation there involved did not infringe constitutional rights, it follows that the Wisconsin Statute does not infringe such rights.

To find that the Wisconsin Statute violates the rights of freedom of speech and of assembly would require an unwarranted extension of the definition of those rights. This court rejected a similar attempt at extension in *Lincoln Union v. Northwestern Co.*, 335 U. S. 525, 69 S. Ct. 251, 93 L. ed. 212. In the same case the court discussed its change in view concerning the limitations of the due process clause as applied to state legislation. It said:

> "In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

If attempt should be made to apply the law in a case where the extent of public interest does not warrant the regulation, the question must be considered in that case—not here. In the instant case the transportation service provided by the respondent employer and its employees is the only one available in a community of half a million or more people. Certainly that is "an essential public service" of such great importance to the many people dependent upon it as to warrant special legislative treatment.

Petitions also argue that the Wisconsin Statute is indefinite and vague.

No criminal law, however, could be so precisely framed that there could never be a question as to its applicability to particular circumstances near the border line.

In the case of *Nash v. United States*, (1913) 229 U. S. 373, 376, 33 S. Ct. 780, 57 L. ed. 1232, Mr. Justice Holmes, speaking for the court, said in upholding a statute prohibiting contracts and combinations in restraint of trade:

> "Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute

contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. Tozer v. United States, (52 Fed. 917, 919.)

"But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw' [citing cases]."

Certainly the statute there involved was far less susceptible of precise definition by the layman than the one involved in the instant case.

It is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided that there is sufficient warning to one bent on obedience, that he comes near the prescribed area. *Nash v. United States*, *supra*; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 S. Ct. 853, 58 L. ed. 1284, *State v. Evjue*, 253 Wis. 146.

In the case of *Wisconsin E. R. Board v. Amalgamated Asso.* (1949), 257 Wis. 43, 50-52, in answering the contentions of the union that it and its members were denied the constitutional right of free speech and the right to assemble for common good and to petition the government and that the statute is so vague and indefinite that its application is in violation of due process of law, the court said:

> "The rights guaranteed by both the federal and state constitutions are individual rights, and they are not absolute. In *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 725, 62 Sup. Ct. 807, 86 L. Ed. 1143, it was stated:
>
> > 'Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this court is plain. Whenever state action is challenged as a denial of "liberty," the question always is whether the state has violated "the essential attributes of that liberty." Mr. Chief Justice HUGHES in *Near v. Minnesota*, 283 U. S. 697, 708. While the right of free speech is embodied in the liberty safeguarded by the due process clause, that clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals, and general welfare of its people. . . . The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise." Ibid at 707.'
>
> "The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual

rights are infringed upon. If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States supreme court recognized this in the case of *International Union v. Wisconsin E. R. Board,* supra, p. 259, when it stated:

> 'This court less than a decade earlier had stated that law [National Labor Relations Act] to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice BRANDEIS that "Neither the common law, nor the Fourteenth amendment confers the absolute right to strike," *Dorchy v. Kansas*, 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Co. v. Deering*, 254 U. S. 443, 488. This court has adhered to that view.'

"Mr. Justice FRANKFURTER also stated this rule in *Carpenters Union v. Ritter's Cafe,* supra, p. 728, as follows:

> 'We hold that the constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the state to set the limits of permissible contest open to industrial combatants." *Thornhill v. Alabama,* 310 U. S. 88, 103.' "

III.

THE WISCONSIN STATUTE DOES NOT IMPOSE INVOLUNTARY SERVITUDE

It was said in *Wisconsin E. R. Board v. Amalgamated Asso.*, (1949) 257 Wis. 43, 52:

"The contention that the legislation is unconstitutional because it imposes involuntary servitude is answered by the language of the statute itself. Sec. 111.64, Stats., reads as follows:

> '*Construction.* (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public-utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public-utility employer to lock out his employees, where such acts would cause an interruption of essential service.'
>
> '(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.'

"Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advant-

ages, such as continuity of employment, that were mentioned above."

No case has been cited holding that legislative limitations on strikes violate the Thirteenth Amendment of the Constitution. Decisions by the federal courts are to the contrary. The statute upheld in *Dorchy v. Kansas,* (1926) 272 U. S. 306, 47 S. Ct. 86, 71 L. ed. 248 was one which made it a crime to "induce others to quit their employment for the purpose and with the intent to hinder, delay, or suspend the operation" of enumerated industries. The statute there involved was a broad one, not limited to public utilities as in the instant case.

In the case of *France Packing Co. v. Dailey,* (C. C. A. 1948) 166 F. 2d 751, the Court of Appeals for the Third Circuit held that legislative limitations on the latter do not even present a constitutional question under the Thirteenth Amendment; because the right to strike is quite different from the right of the individual worker to quit his job, and it is the latter with which the Thirteenth Amendment is concerned.

The case of *State ex rel. Hopkins v. Howat,* (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686 is another in which a law restricting strikes was upheld. Writ of error was dismissed by the United States Supreme Court in *Howat v. Kansas,* (1922) 256 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

The U. S. Supreme Court has tacitly recognized that there is no constitutional objection to an injunction restraining a union and its officials from encouraging workers to interfere with production by strike or cessation of work. See *United States v. United Mine Workers of America,* (1947) 330 U. S. 258, 91 L. ed. 884, 67 S. Ct. 677.

The District Court of the Northern District of Illinois considered the question expressly in *Western Union Tel. Co. v. International B. of E. Workers,* (1924) 2 F. 2d 993, 994, affirmed 4th C. C. A., 6 F. 2d 644, 46 A. L. R. 1538; certiorari denied 285 U. S. 630, 76 L. ed. 536, 52 S. Ct. 13, in which an injunction against striking was upheld against attack on constitutional grounds. The court said:

> "As to clause 1 of the prayer for a temporary injunction it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. The right to cease work is no more an absolute right than is any other right protected by the Constitution. Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to none unless he has been guilty of a breach of contract. But the cessation of work may be an affirmative step in an unlawful plan. One may not accept employment intending thereby to quit work when that act will enable him to perform one step in a criminal conspiracy. * * * These defendants are under no compulsion to accept employment on buildings where plaintiff's equipment is being installed; and, if they do accept it they are not permitted to make an unlawful use of it. * * *"

See, also, the decision of the United States Supreme Court in *Southern S. S. Co. v. National Labor Relations Board,* (1942) 316 U. S. 31, 62 S. Ct. 836, 86 L. ed. 246, in which it recognized the right of Congress to make unlawful a seamen's strike even when the boat was docked.

Legislation has been upheld prohibiting strikes in hospitals and charitable institutions, which endanger public health.

Elizabeth Gen. Hosp. and Dispensary v. Elizabeth Gen. Hosp. Employees, et al., 4 Labor cases, par. 60,590 (N. J. Ct. of Chancery 1941);

Western Pennsylvania Hospital v. Lichliter, (1941) 340 Pa. 382, 17 A. 2d 206;

Society of New York Hospital v. Hanson, 59 N. Y. S. 2d 91, (Sup. Ct. 1945);

Beth-El Hospital, et al. v. Robbins, (1946) 10 Labor Cases par. 62,944, 60 N. Y. S. (2d) 798.

Bailey v. Alabama, (1910) 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145 and *Pollock v. Williams*, (1944) 322 U. S. 4, 88 L. ed. 1095, 64 S. Ct. 792, cited by petitioners, involved statutes which, in effect, punished refusal to continue in the service of creditors. The instant case does not require anyone to continue in the service of another.

The provision quoted from *Holden v. Hardy*, 169 U. S. 366, 397, 42 L. ed. 780, 18 S. Ct. 383, was written in upholding the validity of state legislation limiting the hours of work in mines, which was challenged as abridging the rights of both employer and employee to make their own contracts. It had no relation to the question of strikes. Indeed, the same excerpt might be used to sustain the legislative regulation here involved as providing a means of enforcing reasonable standards against employers.

Striking is not the exercise of an individual right but rather the imposition of a coercive economic weapon. As such the right to engage in strikes even in the absence of legislative restriction was in serious doubt under the common law, and many jurisdictions held that strikes were unlawful even though they had a legal objective. Other jurisdictions concluded that if strikes were justified by a

legal objective they were not unlawful *per se;* but even such jurisdictions recognize that the coercive nature of the activity requires proper justification which would not be true of the exercise of an individual right protected by the constitution.

Even if a constitutional right were involved, it might be surrendered by contract or by entering a field of operation where the public interest has been recognized as so extensive as to warrant special regulation as in the case of public utilities. The type of regulation imposed in this state upon *utilities* would probably be in violation of the Fourteenth Amendment if it were to be applied in restriction of property rights in businesses not so classified. The case of *Wilson v. New*, (1916) 243 U. S. 332, 61 L. ed. 755, 37 S. Ct. 298 points out that the same standard applies to employees who enter service in a public utility as applies to other types of utility regulation.

No question of constitutionality was involved in *American Steel Foundries v. Tri-City Central T. Council*, (1921) 257 U. S. 184, 42 S. Ct. 72, 66 L. ed. 189. That case dealt with the permissible extent of injunctions under the Clayton Act and involved primarily statutory interpretation.

The case of *National Labor Relations Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 has nothing to do with constitutionality of legislation curbing strikes.

None of the cases cited by the appellants support their contention that the constitution forbids legislation curbing strikes. Argument that it is desirable economically that employees should have the right to strike is not for the courts but should be addressed to the legislature, because

that is the body which weighs and chooses among conflicting economic theories.

We do not believe that the sponsors of the constitutional provision against slavery and involuntary servitude ever contemplated that the provision should prevent legislatures from dealing with the strike as a coercive weapon, when it infringes upon important public services.

The following excerpts from *Carpenters' Union v. Ritter's Cafe*, (1943) 315 U. S. 722, 724, 62 S. Ct. 807, 86 L. ed. 1143, applies to the type of legislation under consideration:

> " 'The right of the State to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted * * *. But the petitioners now claim that there is to be found in the due-process clause of the fourteenth amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the States must be powerless to confine the use of this industrial weapon within reasonable bounds.' "

After discussing the precise limitation placed by the Texas court upon the picketing of respondent's restaurant, Mr. Justice Frankfurter then said:

> " 'We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that the "rights of employers and employees to conduct their economic affairs and to combat with others for a share in the products of industry are subject to modification or qualification in the interests of

the society in which they exist. This is but an instance of the power of the State to set the limitation of permissible contest open to industrial combatants.'"

CONCLUSION

It is respectfully submitted that the Wisconsin Statute and the judgment based thereon do not violate the federal constitution by reason of any intrusion upon or conflict with congressional action with respect to labor and management relations; that neither is the Wisconsin Statute in violation of the 13th or 14th Amendments of the federal constitution. For these reasons, it is respectfully submitted that judgment of the supreme court of Wisconsin herein should be affirmed.

Respectfully submitted,

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